

(4) Matching purpose, must all be present before a matching program is covered under the Privacy Act.

§ 317.93 Matching program exclusions.

The following are not included under the definition of a matching program. The agency is not required to comply with the computer matching provisions of the Privacy Act, although it may be required to comply with any other applicable provisions of the Act and this part.

(a) *Statistical matches whose purpose is solely to produce aggregate data stripped of personal identifiers.* This does not mean that the data bases used in the match must be stripped prior to the match, but only that the results of the match must not contain data identifying any individual. Implicit in this exception is that this kind of match is not done to take action against specific individuals.

(b) *Statistical matches whose purpose is in support of any research or statistical project.* The results of these matches need not be stripped of identifiers, but they must not be used to make decisions that affect the rights, benefits or privileges of specific individuals.

(c) *Pilot matches.* This exclusion covers small scale sampling matches whose purpose is to gather cost-benefit data on which to premise a decision about engaging in a full-fledged matching program. Pilot matches must be retained in a statistical information gathering channel. It is at this point that the component can decide whether to conduct a statistical data gathering match without consequences to the subjects of record or a full-fledged program where results will be used to take specific action against them. To avoid possible misuse of pilot matches and to ensure full compliance with the Privacy Act, these matches must be approved by the Defense Data Integrity Board.

(d) *Law enforcement investigative matches whose purpose is to gather evidence against a named person or persons in an existing investigation.* (1) To be eligible for the exclusion the match must be performed by an activity of a component whose principal function involves enforcement of criminal laws,

i.e., an activity that is authorized to exempt certain of its systems of records under subsection (j)(2) of the Privacy Act.

(2) The match must flow from an investigation already underway which focuses on a named person or persons. Subjects identified generically, e.g., "program beneficiaries," are not eligible.

(3) The investigation may be into either criminal or civil law violations.

(4) In the context of this exclusion only, person or persons could include subjects that are other than individuals as defined in the Privacy Act, such as corporations or other business entities. For example, a business entity could be named subject of the investigation and records matched could be those of customers or clients.

(5) The match must be for the purpose of gathering evidence against the named person or persons.

(e) *Tax administration matches.* (1) Matches involving disclosures of taxpayer return information to state or local tax officials pursuant to section 6103(d) of the Internal Revenue Code.

(2) Tax refund offset matches accomplished pursuant to the Deficit Reduction Act of 1984.

(3) Matches done for tax administration pursuant to section 6103(b)(4) of the Internal Revenue Code.

(4) Tax refund offset matches conducted pursuant to other statutes provided approval of the Office of Management and Budget is obtained.

(f) *Routine administrative matches using Federal personnel records.* These are matches between the agency and other Federal agencies or between the agency and non-Federal agencies for administrative purposes that use data bases that contain records predominantly relating to Federal personnel. The term "predominantly" means that the percentage of records in the system that are about Federal employees must be greater than of any other category contained therein. For the purpose of disclosing records subject to the Privacy Act, the Department of Defense is considered a single agency.

(1) The purpose of the match must not be intended to result in an adverse action. Matches whose purpose is to take any adverse financial, personnel,

disciplinary or other adverse action against Federal personnel whose records are involved in the match, are not excluded from the Act's coverage.

(2) An example of a match that is excluded is an agency's disclosure of time and attendance information on all agency employees to the Department of the Treasury in order to prepare the agency's payroll.

(3) This exclusion does not bring under the Act's coverage matches that may ultimately result in an adverse action. It only requires that their purpose not be intended to result in an adverse action.

(g) *Internal matches using only records from DoD systems of records.* (1) Internal matches (conducted within the Department of Defense) are excluded on the same basis as Federal personnel record matching provided no adverse intent as to a Federal employee motivates the match.

(2) This exclusionary provision does not disturb subsection (b)(1) of the Act permitting disclosure to DoD employees on an official need-to-know basis.

(3) The purpose of the internal match must not be to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel.

(h) *Background investigation and foreign counterintelligence matches.* Matches done in the course of performing a background check for security clearances of Federal personnel or Federal contractor personnel are not covered. Matches done for the purpose of foreign counterintelligence are also not covered.

§ 317.94 Conducting matching programs.

(a) *Source and recipient agencies.* The agency, if undertaking a matching program, should consider if it will be a "source agency" or a "recipient agency" for the match and be prepared to meet the following requirements:

(1) The recipient agency does the matching. It receives the data from system of records of other Federal agencies or data from state and local governments and actually performs the match by computer.

(2) The recipient agency is responsible for publishing a notice in the FED-

ERAL REGISTER of the matching program. Where a state or local agency is the recipient, the Federal source agency is responsible for publishing the notice.

(3) A Federal source agency discloses the data from a system of records for the match. A non-Federal agency may also be a source, but the record data will not be from a system of records. The "system of records" concept under the Privacy Act does not apply to the recordkeeping practices of state or local governmental agencies.

(4) The recipient Federal agency, or the Federal source agency in a match performed by a non-Federal agency, is responsible for reporting the match. This agency must contact the other participants to gather the information necessary to make a unified report as required by § 317.100.

(5) In some circumstances, a source agency may be the instigator and ultimate beneficiary of the matching program, as when an agency lacking computer resources uses another agency to perform the match; or when as a practical matter, an agency may not wish to release and disclose its data base to another agency as a source because of privacy safeguard considerations.

(b) *Compliance with the system of records and disclosure provisions.* (1) The agency must ensure that it identifies the system(s) of records involved in the matching program and has published the necessary notice(s) in the FEDERAL REGISTER.

(2) The Privacy Act does not itself authorize disclosures from system of records for the purpose of conducting a matching program. The agency must justify any disclosures outside the Department of Defense under subsection (b) of the Act. This means obtaining the written consent of the subjects of record for the disclosure or relying on one of the 12 non-consensual disclosures exceptions to the written consent rule. To rely on the routine use exception (b)(3), the agency must have already established the routine use (published in the FEDERAL REGISTER), or in the alternative, must comply with subsections (e)(4)(d) and (e)(11) of the Act which means amending the record system notice to add an appropriate routine use for the match. An amendment